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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TRACFONE WIRELESS, INC.,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B207288

(Los Angeles County  
Super. Ct. No. BC363735)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Mel Red Recana, Judge. Reversed.

Silverstein & Pomerantz, Robert R. Gunning and Edwin P. Antolin for Plaintiff  
and Appellant.

Sutherland Asbill & Brennan, Eric S. Tresh and Pilar Mata Sansone for Broadband  
Tax Institute as Amicus Curiae on behalf of Plaintiff and Appellant.

Morrison & Foerster, Thomas H. Steele and Kirsten D. Wolff for California  
Taxpayers' Association as Amicus Curiae on behalf of Plaintiff and Appellant.

KLA Piper, David Colker and Stephen Chiari for CTIA-The Wireless Association  
as Amicus Curiae on behalf of Plaintiff and Appellant.

Office of the City Attorney, Noreen S. Vincent, Beverly Cook, Michael Nagle,  
Assistant City Attorneys; Colantuono & Levin, Michael G. Colantuono, Sandra J. Levin;

Orrick, Herrington & Sutcliff, William Molinski, Valerie M. Goo and Frank D. Rorie for Defendant and Respondent.

Dennis J. Herrera, City Attorney (San Francisco), Julie Van Nostern, Chief Tax Attorney, and Peter J. Keith, Deputy City Attorney, for The League of California Cities, The California State Association of Counties, and The California Special Districts Association as Amici Curiae on behalf of Defendant and Respondent.

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## INTRODUCTION

This is a suit for a refund of telephone user taxes paid by plaintiff TracFone Wireless, Inc. (plaintiff) to defendant City of Los Angeles (city). The trial court sustained the city's demurrer to plaintiff's first amended complaint without leave to amend, and then entered judgment in favor of the city. We reverse.

Pursuant to its municipal code, the city imposes a 10 percent tax on users of telephone services within the city. Providers of telephone services such as plaintiff are required to collect the tax and remit it to the city.

After paying the tax to the city, plaintiff filed a claim for a refund alleging that its sales of telephone services were exempt from the tax. The city never responded to the claim; under the city charter, the claim was deemed denied 45 days after it was filed. Plaintiff then commenced this action against the city.

The city contends that plaintiff's suit is barred for two main reasons. First, the city argues that plaintiff does not have standing to seek a refund because it is not a taxpayer and thus it merely "volunteered" to pay its customers' tax liability. We reject this argument because plaintiff paid the city disputed taxes in order to avoid penalties and interest. Plaintiff clearly has an interest in obtaining a refund of monies it claims the city was never entitled to collect.

The city also claims that former Los Angeles Municipal Code section 21.1.12 (section 21.1.12) bars providers such as plaintiff from obtaining a refund of overpaid taxes from the city unless the provider first refunds the disputed taxes to its customers. Because plaintiff did not refund any money to its customers, the city contends that plaintiff is barred from seeking a refund from the city.

We reject this argument because the provision of section 21.1.12 relied upon by the city does not apply to plaintiff or other providers who did not collect the taxes from their customers. Moreover, for reasons we shall explain, if we interpret the provision in the manner advocated by the city, it would violate plaintiff's due process rights. We thus reject the city's interpretation of section 21.1.12 and hold that plaintiff was not required to refund any money to its customers before filing this suit.

### **BACKGROUND**

#### *1. General Allegations in the First Amended Complaint*

The following allegations appear in the first amended complaint, plaintiff's operative pleading. Plaintiff is a vendor of prepaid telephone calling cards throughout the United States, including the city. It typically sells the cards to retailers, which in turn resell them to consumers. In the vast majority of transactions, plaintiff has no point of sale contact with the ultimate consumers of the cards.

Los Angeles Municipal Code section 21.1.3 (section 21.1.3) imposes a telephone user tax at the rate of 10 percent on all charges for intrastate, interstate, and international telephone services when the owner or lessee of the telephone has a billing address in the city. Subdivision (d) of section 21.1.3 provides that the tax shall not be imposed to the extent that the services are exempt from the federal excise tax (FET).<sup>1</sup> Because the FET

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<sup>1</sup> Former section 21.1.3, subdivision (d) provided: "Notwithstanding the provisions of Subsection (a), the tax imposed under this section shall not be imposed upon any person for using telephone communications services or teletypewriter exchange services, to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under Sec. 4251 of Title 26 of the United States Code, as such Section existed on November 1, 1967." This provision was in effect at the time plaintiff paid the taxes in dispute.

does not apply to prepaid telephone cards, the telephone user tax does not apply to the services provided by plaintiff.

The city, however, took the position that plaintiff was liable for the tax. Since plaintiff was not able to collect the tax from ultimate consumers, plaintiff began paying the tax itself in November 2004. In May 2005, the city issued a revised assessment advising plaintiff that it underpaid the tax for a certain period of time, and that plaintiff was obligated to pay the city a penalty and interest. Plaintiff paid the city “under compulsion” an aggregate amount of \$180,482.15. On December 20, 2005, plaintiff filed a refund claim with the city for that amount.

Plaintiff’s claim satisfied all the requirements of Government Code section 910 et seq. The city never issued a notice of insufficiency in accordance with Government Code section 910.8 and never responded to plaintiff’s claim. Under Los Angeles City Charter section 350, subdivision (b), the claim was deemed denied.<sup>2</sup>

## *2. Plaintiff’s Causes of Action*

Based on the allegations stated in section 1, *ante*, the first amended complaint sets forth four causes of action. The first cause of action is for “refund of taxes.” Plaintiff alleges that it is entitled to a refund of telephone user taxes it paid because under section 21.1.3, subdivision (d), its sales were exempt from the tax.

The second cause of action is for “due process violation.” Plaintiff alleges that the city’s refusal to refund plaintiff the taxes it paid the city was a violation of plaintiff’s due process rights under the United States and California Constitutions.

The third cause of action is for “unconstitutional taking.” Plaintiff alleges that the city’s refusal to refund to plaintiff all of the telephone user taxes it paid “constitutes the taking of private property without adequate compensation under the United States and California Constitutions.”

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<sup>2</sup> A claim with the city is deemed rejected if it is not acted upon within 45 days. (L.A. City Charter, § 350(b).)

The fourth cause of action is for declaratory relief. Plaintiff seeks a declaration that it was not obligated to pay the telephone user tax “on a prospective basis.”

3. *The Demurrer and Judgment*

The city demurred to plaintiff’s first amended complaint on the ground that it failed to state facts sufficient to state a cause of action. The trial court sustained the demurrer without leave to amend with respect to the first, second and third causes of action and overruled the demurrer with respect to the fourth cause of action. Shortly thereafter, plaintiff stipulated to dismissing its fourth cause of action without prejudice, and the trial court entered judgment in favor of the city. This appeal followed.

### ISSUES

There are two main issues:

1. Does plaintiff have standing to seek a refund of the telephone user tax it paid the city?
2. Does plaintiff’s alleged failure to comply with section 21.1.12 bar plaintiff’s suit?<sup>3</sup>

We do not decide the merits of the causes of action in the first amended complaint, but only whether a cause of action has been stated.

### DISCUSSION

1. *Standard of Review*

“When reviewing an order sustaining a demurrer, we review the trial court’s ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. [Citation.] We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or

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<sup>3</sup> We requested and received briefs from the parties and amici curiae regarding whether the provision in section 21.1.12 relied upon by the city is preempted by Government Code sections 905 and 935. Because we rule in plaintiff’s favor on other grounds, we do not reach this issue. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17.)

conclusions of fact or law. [Citation.]” (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.)

## 2. *Plaintiff Has Standing*

In *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359 (*TracFone I*), the court addressed the same standing issue we address here. The plaintiff in *TracFone I* was the same company as the plaintiff in this case; the defendant was the County of Los Angeles (county). In *TracFone I*, plaintiff sought a refund of telephone user taxes from the county based on the same causes of action plaintiff asserts here. The county, like the city in this case, argued that plaintiff did not have standing because it was not the “taxpayer” under the county code. Division Four of this court rejected the county’s argument and held that plaintiff had standing. (*Id.* at pp. 1364-1366.) *TracFone I* is directly on point. We find the reasoning of *TracFone I* persuasive and hold that plaintiff has standing.

“In general, one who is beneficially interested in the outcome of a controversy has standing to sue. [Citation.] Beneficial interest means a personal interest in the outcome. [Citation.] In the tax context, this means that the person is barred from seeking a refund of a tax he or she has not paid.” (*TracFone I, supra*, 163 Cal.App.4th at p. 1364.) Here, plaintiff clearly has an interest in the outcome of this suit. Plaintiff paid the city \$180,482.15 and it wants that money back.

The city argues that plaintiff should be barred from seeking a refund because it failed to collect the telephone user tax from its customers, as the municipal code allegedly required. Plaintiff contends that it was unable to collect the tax from its customers and was not obligated to do so because its services were exempt. Whether plaintiff’s substantive claims are meritorious and whether plaintiff was obligated to collect the tax from its customers are issues that are irrelevant to plaintiff’s standing. If plaintiff is correct that its services were exempt from the tax, it is entitled to the refund it seeks unless the city prevails on an affirmative defense. If the city prevails on the merits, then plaintiff will not get its refund. In either case, plaintiff has an interest in the outcome of the controversy.

The city argues plaintiff “voluntarily” paid the telephone user tax, and voluntary tax payments are generally not recoverable in the absence of a statute permitting a refund thereof. (See *TracFone I, supra*, 163 Cal.App.4th at p. 1366.) “Whether the circumstances are such that a reasonable person would have paid the tax is a question of fact. [Citation.] Questions of fact may be resolved on demurrer only when there is only one legitimate inference to be drawn from the allegations of the complaint.” (*Id.* at p 1368.)

Here, the first amended complaint alleges that the city assessed a penalty and interest against plaintiff and that plaintiff paid the tax to avoid additional penalties and interest. These allegations are sufficient to support plaintiff’s contention that its payments to the city were involuntary. The trial court thus erred in sustaining the city’s demurrer on the ground that plaintiff lacked standing.

### 3. *Section 21.1.12 Does Not Bar Plaintiff’s Suit*

We interpret section 21.1.12 de novo (see *Bohbot v. Santa Monica Rent Control Bd.* (2005) 133 Cal.App.4th 456, 462 (*Bohbot*)) by the same rules applicable to statutes. (See *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290; *Bohbot*, at p. 462.) Our fundamental task is to ascertain the city council’s intent. (See *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 (*Smith*).) The meaning of a provision of a municipal code “ ‘may not be determined from a single word or sentence; the words must be constructed in context . . . .’ ” (See *People v. Shabazz* (2006) 38 Cal.4th 55, 67.)

Where reasonably possible, we also avoid any construction that renders “particular provisions superfluous or unnecessary” (see *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459) or that would lead to absurd consequences. (See *Smith, supra*, 39 Cal.4th at p. 83; *State Bd. of Equalization v. Superior Court* (2006) 138 Cal.App.4th 951, 956.) Where a provision of a municipal code is subject to several interpretations, one of which raises serious constitutional problems, we will construe the provision, if possible, to avoid those problems. (See *People v. Brown* (1993) 6 Cal.4th 322, 335; *Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 177.)

Section 21.1.12, subdivision (c) provided, in part: “A person required to collect and remit [telephone user] taxes imposed under this article may claim a refund or take a credit against taxes collected and remitted the amounts overpaid, paid more than once or erroneously or illegally collected or received when it is established in a manner prescribed by the Director of Finance that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax *so collected* has either been refunded to the service user or credited to charges subsequently payable by the service user to the person required to collect and remit.”<sup>4</sup> (Italics added.)

This provision states that a provider *who collected taxes from telephone users* must either refund the taxes to the users or give the users a credit before obtaining a refund from the city. It does not apply to plaintiff because plaintiff did not collect any taxes from telephone users. Accordingly, section 21.1.12, subdivision (c), *by its own terms*, does not bar plaintiff from seeking a refund from the city.

The city argues that we should interpret section 21.1.12 in a manner that does not reward plaintiff’s failure to collect taxes from telephone users, as section 21.1.3, subdivision (c) allegedly required. According to the city, even though plaintiff’s customers never paid any telephone user taxes, section 21.1.12, subdivision (c) required plaintiff to “refund” the disputed taxes to its customers *before* plaintiff could pursue a refund from the city. As already explained, section 21.1.12, subdivision (c)’s refund requirement does not apply to this fact situation.

Moreover, the city’s interpretation of section 21.1.12, subdivision (c) would impose an absurd burden on plaintiff. If we accept the city’s interpretation, plaintiff would be required to pay the city \$180,482.15 and pay its customers \$180,482.15—for a total of \$360,914.30—before it could file a claim with the city for a refund in the amount

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<sup>4</sup> This provision was applicable during the time period at issue. It was confusingly located in a subdivision that set forth the requirements of exemptions for low-income seniors and disabled individuals. The provision is currently in its own subdivision. (L.A. Mun. Code, § 21.1.12, subd. (e).)



of \$180,482.15. If it prevailed against the city, plaintiff would be deprived of a meaningful remedy because there would be no realistic, cost-effective means for plaintiff to recover all or a substantial portion of the \$180,482.15 in refunds it paid its numerous customers. What makes matters worse is that in the vast majority of its transactions, plaintiff did not have any contact with the ultimate consumers of its prepaid telephone calling cards. Thus plaintiff would be faced with a seemingly insurmountable burden of contacting the users of its cards, first to pay them a refund and second, in the event plaintiff prevails on its claims against the city, to request its customers to pay the refund back to plaintiff.

The city's interpretation of section 21.1.12, subdivision (c) raises serious due process concerns. Where the government penalizes a taxpayer for failure to remit its taxes in a timely fashion, thus requiring the taxpayer to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the government to afford the taxpayer a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unlawful. (*McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18, 22, 36-39.) This means that the government must provide a "clear and certain remedy" to the taxpayer. (*Id.* at p. 39; accord *General Motors Corp. v. City and County of San Francisco* (1999) 69 Cal.App.4th 448, 455; *City of Modesto v. National Med., Inc.* (2005) 128 Cal.App.4th 518, 529.)

Here, as we have explained, if we adopt the City's interpretation of section 21.1.12, subdivision (c), plaintiff does not have a clear and certain means of obtaining a post-payment remedy of taxes it paid to the City.<sup>5</sup> Our interpretation of section 21.1.12, subdivision (c), avoids this constitutional problem.

For all of the reasons we have stated, plaintiff's alleged failure to comply with section 21.1.12, subdivision (c) does not bar plaintiff's action.

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<sup>5</sup> Although plaintiff is not the "taxpayer" under section 21.1.3, it was allegedly compelled to remit taxes to the city in order to avoid penalties and interest.

**DISPOSITION**

The judgment is reversed. Plaintiff is awarded costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P .J.

CROSKEY, J.